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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ANDRE J. COHEN,

Plaintiff and Appellant,

v.

MELVIN MORRIS,

Defendant and Respondent.

B234713

(Los Angeles County
Super. Ct. No. BC415868)

APPEAL from a judgment of the Superior Court of Los Angeles County,

Kevin C. Brazile, Judge. Affirmed.

Jones, Bell, Abbott, Fleming & Fitzgerald and Fredrick A. Rafeedie for Plaintiff
and Appellant.

Regan & Associates, James J. Regan and Lorne Lilienthal for Defendant and
Respondent.

Andre J. Cohen (Cohen) appeals the summary judgment entered in favor of Melvin Morris (Morris). Cohen brought this lawsuit seeking damages resulting from the breach of two purported oral agreements: a Partnership Agreement and a Draw Agreement. After these agreements were allegedly breached, the parties entered into a General Agreement, which provided that upon payment of \$300,000 from Morris to Cohen, “all parties [would] be satisfied” and owe each other nothing. Morris obtained summary judgment on the basis that the clear and unambiguous terms of the General Agreement settled any and all claims between the parties. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. Underlying Facts

In August 2001, Cohen, then a housing inspector for the city of Los Angeles, met Morris, a real estate developer, while inspecting one of Morris’s properties. After Cohen expressed interest in real estate development, Morris agreed to sell Cohen some of his properties on credit. The parties agreed that Cohen would take ownership after he refurbished the properties, and pay off Morris by refinancing them. The parties successfully completed four such arrangements. Following this mutually advantageous relationship, Cohen alleges the parties entered into a Partnership Agreement whereby they would acquire and develop real estate together. Cohen was to contribute labor, expertise, and his general contractor’s license, while Morris was to contribute the necessary capital; the parties were to share profits and losses equally.

From 2004 to 2008, the parties discussed and began rehabilitating and/or developing several properties. One project, a 111-unit apartment building, was to be

built in Palmdale. Initially, it was to be built on 15th Avenue, but the parties ultimately exchanged the 15th Avenue property for one on 13th Avenue, which consisted of four adjoining parcels. On May 28, 2006, Morris agreed to sell the 13th Avenue Palmdale Project (Palmdale Project) to Cohen for \$1,500,000, with a \$300,000 down payment and the balance to be paid within two years. Of the \$300,000, Cohen only paid \$250,000.¹

Cohen eventually exhausted his resources because the \$250,000 had constituted most of his life savings and he had no outside income. After informing Morris, in June 2007, that he would be unable to continue working without regular compensation, Cohen alleges that Morris allowed Cohen to take money out of the work account to satisfy his living expenses.² After requesting a set amount each month, Cohen alleges that Morris agreed, in January 2008, to advance him \$12,000 per month to continue working on the projects (Draw Agreement), which would be deducted from Cohen's share of the profits. Morris advanced Cohen \$12,000 in January and February, \$4,000 in March, and nothing thereafter. In April 2008, Morris told Cohen to stop working on all projects. Cohen never returned to any of the projects.

For the next two months, Cohen borrowed money and sold his belongings to pay his bills. Facing an impending foreclosure of his home and having no other means to borrow money, Cohen sent Morris a letter dated June 11, 2008, stating, "[a]ll I am looking for from u [sic] is an exit strategy. . . . All I want is to communicate about our

¹ Morris accepted the \$250,000 and has never claimed that Cohen was in breach for this underpayment.

² In his declaration, Morris states that he was "suspicious that Cohen was taking money from the projects, using it for personal expenses, and not accounting for it."

projects that we worked on together.” The parties met one week later and signed the “General Agreement,” which provides in part: “The following agreement is a total refund of \$300,000.00 for a contract signed on May 28, 2006 . . . for the purchase of [the Palmdale Project]. This agreement will serve as an exit for all projects between Melvin Morris and Andre Cohen. Upon payment of \$300,000.00 Melvin Morris owes Andre Cohen . . . zero monies. Upon payment received by Andre Cohen from Melvin Morris, Andre Cohen owes Melvin Morris zero monies. . . . [¶] Upon receiving the final payment all parties will be satisfied.” Morris paid Cohen \$300,000 pursuant to a payment schedule outlined in the agreement. Cohen never attempted to return to work on any of the projects.

2. Allegations of the Complaint

Cohen filed the instant action one year later, seeking to recover damages based on “The Repudiation of Partnership Agreement And Conversion of Partnership Assets.” Cohen alleged causes of action for (1) Breach of Contracts, (2) Breach of Fiduciary Duty, (3) Conversion, (4) Actual Fraud, and (5) Constructive Fraud. All five causes of action were premised on an alleged breach by Morris of at least one of two purported agreements: the Partnership Agreement and the Draw Agreement.

With respect to the Partnership Agreement, Cohen sought payment for nine projects (Other Projects), none of which were the Palmdale Project. Cohen alleged that he had worked without compensation on these projects because he was to be rewarded through ownership of the properties once they were completed; but, since he would

never take ownership, he sought compensation for his labor.³ Although Cohen described the significant work he had allegedly performed on these properties in his complaint, he failed to allege the value of his labor or the amount of money he spent on these projects.⁴

3. *Motion for Summary Judgment*

Morris moved for summary judgment on the ground that each cause of action was barred by the General Agreement, which stated that following the final payment, each party owed the other nothing. Since the General Agreement was executed following the purported Partnership and Draw Agreements, Morris asserted that those agreements were extinguished upon fulfillment of the General Agreement. Morris argued that Cohen had assented to the terms of the General Agreement by reading and signing it. Further, Morris argued that the \$300,000 was paid to satisfy any debts owed to Cohen because the term “[u]pon receiving final payment all parties will be satisfied” establishes that the parties intended to settle any and all debts owed to one another.⁵

4. *Opposition to Motion for Summary Judgment*

In opposition to Morris’s motion for summary judgment, Cohen argued that Morris failed to establish that an accord and satisfaction was reached. Cohen argued

³ Cohen did not seek recovery in quantum meruit. He instead sought compensation for breach of the Partnership and Draw Agreements.

⁴ Other than general transportation costs, the only specific expense he identified was an apartment rental to enable him to work on one of the projects, but there is no mention of the amount of rent.

⁵ A refund of the amount Cohen had invested in the Palmdale Project would have been only \$250,000, which leaves the additional \$50,000 to resolve any other disputes.

that Morris did not establish the necessary elements of the defense of accord and satisfaction: a bona fide dispute, a meeting of the minds, and that Cohen's causes of action were within the scope of the General Agreement. Specifically, Cohen argued that the General Agreement settled only the parties' dispute with respect to the Palmdale Project and not the Other Projects. To support his argument, he relied almost exclusively on the plain language of the agreement, rather than proffering any extrinsic evidence.⁶

However, Cohen submitted a declaration stating that he had believed the General Agreement related only to the Palmdale Project, noting that, prior to executing the agreement the parties had never specifically discussed that the additional \$50,000 was to constitute compensation for Cohen's time, labor, and expenses for the Other Projects.

5. *Reply to Opposition against Motion*

In his reply, Morris asserted that the plain language of the agreement unambiguously applied to all projects. He argued that any prior agreements were extinguished by the General Agreement because it "specifically and unambiguously state[d] that it 'will serve as an exit for *all* projects' between the parties, and that upon Defendant's payment of \$300,000 to Plaintiff, 'all parties will be satisfied' and owe each other 'zero monies.' " Morris pointed out that Cohen read the General Agreement before signing it. He argued that Cohen's "undisclosed subjective misinterpretation of contractual terms, without knowledge by [Morris]" cannot be used to invalidate the clear and explicit terms of the agreement.

⁶ Cohen fervently argued against the admissibility of any extrinsic evidence.

6. *Ruling on Summary Judgment Motion*

The trial court granted Morris's motion, concluding that the plain language of the General Agreement was an accord and satisfaction of the purported Partnership and Draw Agreements. The court reasoned that the General Agreement clearly and unambiguously provided for the payment of money as a refund for the Palmdale Project while also providing for the termination of all other projects. This conclusion is reinforced by the phrase, "this agreement will serve as an exit for all projects between Melvin Morris and Andre Cohen," and by the language stating that once payment was made, each party would owe the other no money and all parties would be satisfied. The trial court agreed with both parties that extrinsic evidence was irrelevant because the terms of the agreement were "clear and unambiguous."

Having found that the purported Partnership and Draw Agreements were terminated upon final payment under the General Agreement, the court concluded that there could "be no breach of those agreements, no breach of a fiduciary duty arising out of the [P]artnership [A]greement, no conversion of real property related to additional projects, and no fraud related to the failure to make payments under the [P]artnership [A]greement."

ISSUES ON APPEAL

Cohen argues that the trial court erred in granting summary judgment for two reasons. First, he argues that Morris failed to meet his burden in asserting his accord and satisfaction defense. Second, he argues that there is a triable issue as to whether the

plain language of the General Agreement covered all projects or just the Palmdale Project.

DISCUSSION

1. Standard of Review

A defendant meets his or her burden when moving for summary judgment if that party has proved that “there is a complete defense to that cause of action.” (Code Civ. Proc., § 437c, subd. (p)(2).) “Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists” (*Ibid.*) In opposing the motion, the plaintiff may not simply rely upon allegations or denials of the pleadings; the plaintiff must set forth specific facts showing that a triable issue of material fact exists. (*Ibid.*; *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 580-581, 593.) The grant of summary judgment is reviewed de novo. (*Szadolci v. Hollywood Park Operating Co.* (1993) 14 Cal.App.4th 16, 19; accord, *Lorenzen-Hughes v. MacElhenny, Levy & Co.* (1994) 24 Cal.App.4th 1684, 1686-1687.)

2. The Plain Language of the General Agreement is an Accord and Satisfaction

In order to succeed on the defense of accord and satisfaction, “it must be established (1) that there was a ‘bona fide dispute’ between the parties, (2) that the debtor made it clear that acceptance of what he tendered was subject to the condition that it was to be in full satisfaction of the creditor’s unliquidated claim, and (3) that the creditor clearly understood when accepting what was tendered that the debtor intended

such remittance to constitute payment in full of the particular claim in issue.”

(*FEI Enterprises, Inc. v. Yoon* (2011) 194 Cal.App.4th 790, 803.)

In determining the existence of a bona fide dispute, courts can use either an objective or subjective standard depending on the intent of the parties, as expressed through the language of the contract. (*FEI Enterprises, Inc., supra*, at p. 800.) When the contract concerns matters related to commercial value, the objective standard is preferred. (*Id.* at p. 801.) If there is a reasonable basis for the non-paying party’s actions, a bona fide dispute exists. (*Id.* at p. 806, fn 11.)

Here, the Partnership and Draw Agreements were made prior to the General Agreement. Cohen asserts that Morris breached the Partnership Agreement, by removing Cohen from all projects, and the Draw Agreement, by stopping the monthly draw payments. Morris denies the existence of these agreements and claims he owes Cohen nothing. Consequently, a bona fide dispute necessarily existed over what Morris owed Cohen under those purported agreements prior to the execution of the General Agreement.

The General Agreement clearly stated that it was to serve as an exit for all projects and that once Cohen received the \$300,000, all parties would be satisfied. Because the clear and unambiguous terms of the agreement made it clear that each party owed the other nothing once Cohen received the \$300,000, all of his claims would be resolved.

An accord and satisfaction depends on the intention of the parties as determined through the parties’ conduct and statements, and the language of the instrument itself.

(*In re Marriage of Thompson* (1996) 41 Cal.App.4th 1049, 1058-1059.) A party's undisclosed intent or understanding of a contract is irrelevant to its interpretation.

(*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 956.)

Cohen read an unambiguous contract, signed it, and received payment pursuant to it. He never disclosed any different understanding of the agreement. Because the clear language of the General Agreement establishes that the parties would owe each other nothing following the \$300,000 payment to Cohen, by reading and signing it, Cohen agreed to those terms.

3. *The Plain Language of the General Agreement Established That It Covers All Projects*

Cohen argues, however, that a triable issue of fact exists as to whether the General Agreement applied only to the Palmdale Project. When interpreting a contract, a court must give effect to the mutual intention of the parties at the time the contract was formed so long as it is ascertainable and lawful. (*E.M.M.I. Inc. v. Zurich American Ins. Co.* (2004) 32 Cal.4th 465, 470.) Such intent is to be inferred from the clear and explicit terms of the contract in their ordinary sense, unless the parties otherwise used them in a technical sense or the meaning is provided by usage. (*Ibid.*) A contract is to be interpreted as a whole, with effect being given to each part. (Civ. Code, § 1641.)

Here, the Palmdale Project is one project and the General Agreement clearly states that it extends to *all* projects. To construe the agreement as covering only the Palmdale Project would make the phrase “exit for all projects” superfluous. Similarly,

the General Agreement expressly provides that upon payment, Morris owes Cohen “zero monies” and “all parties will be satisfied.” Because each provision of the General Agreement⁷ must be given effect, we conclude that the plain language of the agreement establishes that it encompasses all projects.

Cohen argues that the plain language of the General Agreement clearly applies only to the Palmdale Project and not to the Other Projects because (1) “the only projects identified in the General agreement are the Palmdale Projects;” (2) the agreement called for a total refund of \$300,000 for Palmdale and there would be no consideration for the Other Projects; (3) the phrase “serve as an exit for all projects” could mean the four parcels comprising the Palmdale project.

We find these arguments unpersuasive. First, Palmdale was not the only project discussed in the General Agreement since it expressly served “as an exit for all projects.” Second, the \$300,000 could not solely be a refund of Cohen’s investment in the Palmdale Project because it exceeded the amount Cohen had invested in the property.⁸ Third, the parties considered Palmdale to be its own project even though it consisted of four parcels, as they had intended to build a single 111-unit apartment building on the property. The purchase agreement for the Palmdale Project specifically identified a single project, the one on 13th Avenue. Moreover, in his complaint, Cohen

⁷ We note that the agreement itself is titled “General Agreement,” not “Palmdale Project Agreement” or something else implying a narrower scope.

⁸ Cohen never offered any evidence, or even alleged that his unreimbursed expenses on the Other Projects exceeded \$50,000 so that it would be unreasonable to interpret the \$50,000 as compensating him for those expenses.

refers to all of Palmdale as “the Palmdale Property” and in his deposition he refers to the Palmdale Project as a single project rather than multiple projects.⁹

On appeal, for the first time, Cohen attempts to rely upon extrinsic evidence to support his interpretation of the General Agreement. However, before the trial court, he relied exclusively on the language of the agreement and argued *against* the admissibility of extrinsic evidence. The doctrine of waiver ordinarily prohibits a party from basing its argument upon evidence not relied upon at the trial court (*County of Los Angeles v. Southern Cal. Edison Co.* (2003) 112 Cal.App.4th 1108, 1118). There is no reason not to enforce that rule.

⁹ When asked which three projects he worked on, Cohen responded: “College, Oswell, Palmdale.”

DISPOSITION

The judgment entered in favor of Morris is affirmed. Morris shall recover his costs on appeal.

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CROSKEY, Acting P. J.

WE CONCUR:

KITCHING, J.

ALDRICH, J.